FIFTH TRIENNIAL REPORT

OF THE

PROVINCIAL JUDGES REMUNERATION

COMMISSION

2003

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Ontario. Provincial Judges
Remuneration Commission
Triennial report

IN THE MATTER OF THE *COURTS OF JUSTICE ACT* AND IN THE MATTER OF AN INQUIRY BY THE PROVINCIAL JUDGES REMUNERATION COMMISSION (2001) INTO THE COMPENSATION OF PROVINCIAL COURT JUDGES

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
(the "Government of Ontario")

-and-

THE ONTARIO CONFERENCE OF JUDGES
(the "Judges")

BEFORE: Louisa M. Davie, Chair
Douglas K. Gray, Nominee for the Government of Ontario
John C. Murray, Nominee for the Judges

APPEARANCES:

On Behalf of the
Government of Ontario: David Daniels, Counsel
Andre Nowakowski, Counsel
G. Knapper
V. Cheung
B. Bass

On Behalf of the Judges: C. Michael Mitchell, Counsel
Steven M. Barrett, Counsel
Andrea Bowker, Counsel
Michael Code, Counsel
Justice Budgell
Justice Sharpe
Justice Stone

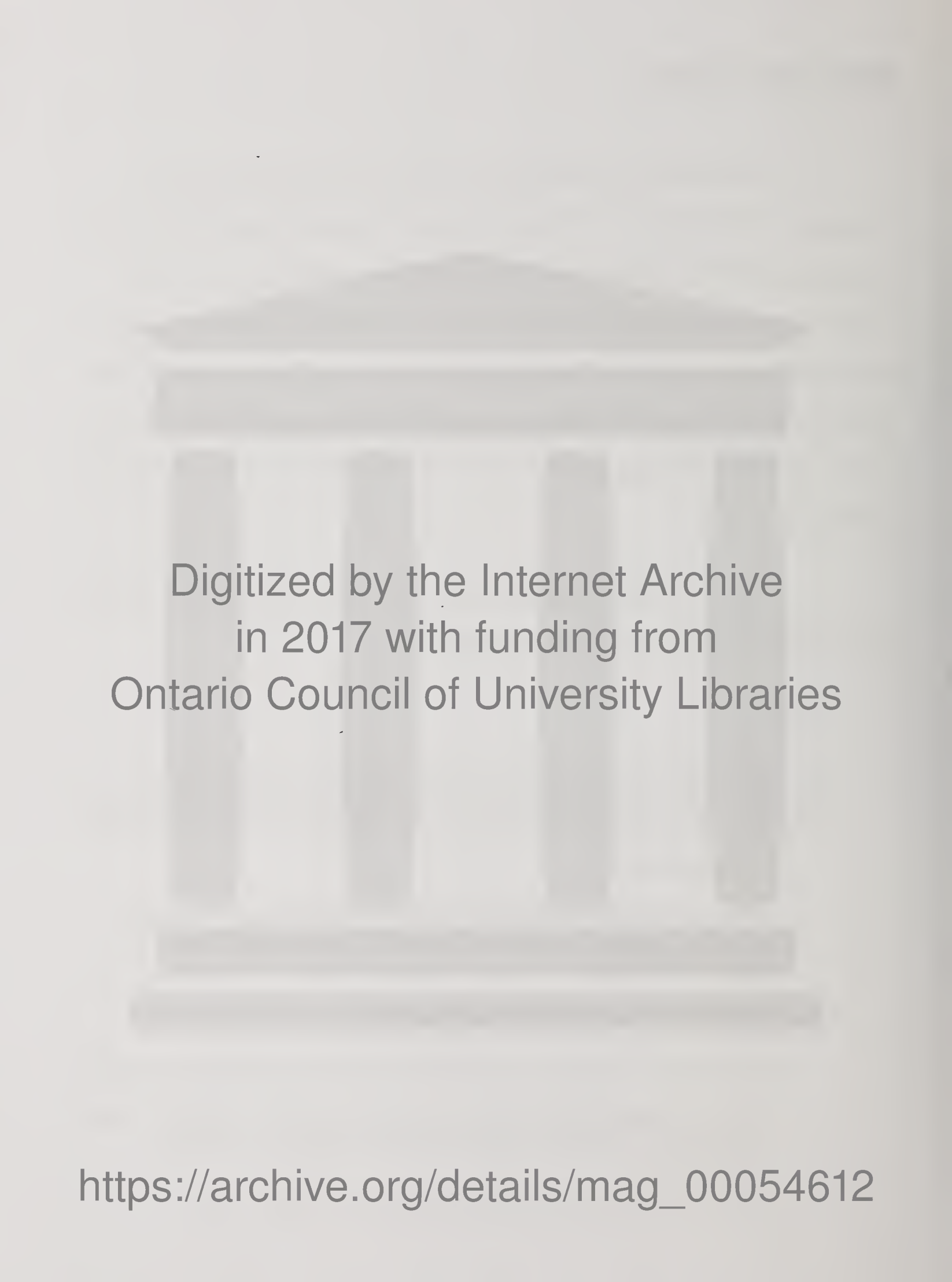
Hearings were conducted in the City of Toronto on November 27, 28, December 5, 16, 17, 2002, January 27, 28, February 5, March 3, April 28, and June 17, 2003

Purpose of the Commission

This is the Fifth Triennial Report of the Provincial Judges Remuneration Commission ("the Commission"). The Commission was constituted pursuant to the Courts of Justice Act, 1994, R.S.O. 1990 c. 43 s.51.13 and the Framework Agreement set out in the schedule to that Act ("the Framework Agreement"). The Framework Agreement forms part of the Courts of Justice Act and establishes an independent, binding process to determine salaries and benefits and allowances for the judges of the Ontario Court of Justice (hereafter "Provincial Judges"). The Framework Agreement sets out the terms of reference and the jurisdiction of this Commission.

Section 25 of the Framework Agreement lists the criteria which the Commission must consider in making its binding recommendations.

> Criteria
>
> 25. The parties agree that the Commission in making its recommendations on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:
>
> a. the laws of Ontario,
>
> b. the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,
>
> c. the growth or decline in real per capita income,
>
> d. the parameters set by any joint working committees established by the parties,
>
> e. that the Government may not reduce the salaries, pensions or benefits of judges, individually or collectively without infringing the principal of judicial independence,
>
> f. any other factor which it considers relevant to the matters in issue.



As indicated herein, it is our view that the criteria set out in section 25 must be read together with section 13 which provides that the Commission must conduct and inquiry respecting "the appropriate base level salaries" and "the appropriate level of and kind of benefits and allowances." The introductory paragraph of section 25 indicates that the criteria must also be read together with section 2 which sets out the purposes of the Framework Agreement. These purposes include the efforts of both the executive branch of the Government and the judiciary "to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice" and to promote cooperation between the two branches of government.

The Public Policy Question

Before this Commission, counsel acting on behalf of Her Majesty the Queen in Right of Ontario, as represented by the Chair of the Management Board (hereafter "the Government") submitted that the task of this Commission was not a public policy making task. Rather, the Commission's responsibility was the narrow, defined task of making binding recommendations with respect to the remuneration, benefits and allowances of the Provincial Judges. It fell to the Government to determine public policy with respect to the administration of justice. The setting of remuneration, benefits and allowances was not a public policy task.

We do not accept that this premise provides the appropriate approach to the interpretation and application of the Framework Agreement. Rather, it is our view that the criteria referred to in section 25, when read together with, and in context of, sections 2 and 13,

are infused with a public interest, broadly defined. The Framework Agreement provides the Commission with broad discretion to consider a variety of matters in making its recommendations. That discretion is consistent with the role of the Commission to present independent, objective recommendations. The Triennial Commission process was designed to depoliticize the establishment of judicial remuneration, benefits and allowances, thus maintaining judicial independence. To conclude that the Framework Agreement does not contain within it an independent public policy making element because the public policy making role falls exclusively to the Government would, in fact, politicize the process.

The Prince Edward Island Reference

We are strengthened in our view that the public policy role of the Commission is imbedded within the terms of the Framework Agreement when reference is made to the decision of the Supreme Court of Canada in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island (1997), 150 D.L.R. (4th) 577 (hereafter "the PEI Reference".) In the PEI Reference the Supreme Court recognized judicial independence as a cornerstone of constitutional democracy and confirmed that judicial independence has both an individual and institutional dimension. Individual judicial independence refers to the independence of a particular judge. Institutional independence relates to the independence of the court of which that judge is a member. The Court stated that there were three "core characteristics of judicial independence -- security of tenure, financial security, and administrative independence." (Paragraph 118, p. 632). As the Commission's role relates to be "financial security" characteristic, we note only the Supreme Court's conclusion that "financial security" has both an

individual and institutional dimension, and its ratio with respect to that characteristic at paragraphs 131 to 135 as follows:

> Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be *depoliticized.* As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.
>
> I begin by stating these components in summary fashion:
>
> *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all are some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration....
>
> *Second*, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the Legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behavior of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, is a form of "horse trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.
>
> *Third,* and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of the judge. Public confidence in the independence of the judiciary would be undermined if judges

were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

With respect to the matter of depoliticizing the relationship between the judiciary and the other branches of government, the Supreme Court acknowledged that the setting of judicial remuneration from the public purse is, as a result, "an inherently political concern in the sense that it implicates general public policy" which must be consistent and balanced with the depoliticized relationship between the three branches of government. To that end, an independent, effective and objective process for determining judicial compensation, such as this Commission process, was required. Regarding the need to be objective the Supreme Court stated at paragraph 173

> In addition to being independent, the salary commissions must be *objective*. They must make recommendations on judges remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" (Canada, Department of Justice, Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits (September 1996), at page. 7).

In addressing those circumstances where the recommendations of an objective Commission which are not binding are not accepted by the government, the Supreme Court indicated that the executive or Legislature must be prepared to justify its decision, "if necessary in a court of law" noting that the "need for public justification, to my mind, emerges from one of the purposes of section 11 (d)'s guarantee of judicial independence --- to ensure public confidence in the justice system." (Paragraph 180). The Court went on to conclude that the "standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendations of the commission..." The Supreme Court found that in those instances, the

Court's review of the Government's justification had two aspects, "First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government..."

Finally, in articulating the requirement that institutional financial security required that judicial salaries not fall below a minimum level, the Supreme Court noted, at paragraph 193 "I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedman has put it, speaking as a concerned citizen, it is "for our sake, not for theirs."

The Framework Agreement pursuant to which this Commission was constituted predates the Supreme Court's decision in the PEI Reference. However, the Framework Agreement was referred to with approval by the Supreme Court. In light of these various comments from the Supreme Court regarding the public interest in the financial security component of judicial independence, and the specific language of the Framework Agreement to which we have already referred, we have concluded that the public interest, broadly defined, is a matter properly considered by this Commission when interpreting and applying the Framework Agreement. That public interest includes not only the fiscal priorities as determined by the Government, but also those matters which impact on the administration of justice which are intertwined with the remuneration of the Provincial Judges. These include, for example, the recruitment issues which both sides addressed in their oral and written submissions.

The Current Circumstances

The Fourth Triennial Commission (hereafter "the Beck Commission") rendered its report on May 20, 1999. It recommended that the salaries of Provincial Judges be increased from the $130,810.00 they were then receiving to $150,000.00 (plus the indexing provided for in the Framework Agreement) in 1998. In addition to the indexing, that represented an increase of approximately 14.7%. The Beck Commission further recommended a base salary of $160,000.00 (an increase of 6.7%) in 1999, and $170,000.00 (a further increase of 6.3%) in 2000. In addition the base salaries for each of those years would be subject to the indexing provided for in the Framework Agreement. At the time of these recommendations, the salary of the federally appointed judiciary of the Superior Court in Ontario, inclusive of the appropriate indexing, was $175,800.00. The Beck Commission stated that "we are of the opinion that the ratio of $170,000 to $175,800 is an appropriate range for the judges in the Provincial Court as against the judges in the General Division [now the Superior Court]."

Following the Beck Commission's Report however, a year later, in May 2000, the Federal Judicial Remuneration Commission (hereafter "the Drouin Commission") recommended increases to the salaries of the federally appointed judiciary which, inclusive of indexing, represented an increase of approximately 18% over 4 years. These recommendations were implemented by the Federal government. The Drouin Commission recommended that the salaries of the federally appointed judiciary be increased from the $178,100 received in 1999, to $198,000 in 2000 (a percentage increase of approximately 11.2% inclusive of indexing) with further increases of $2,000, plus indexing, in each of 2001, 2002 and 2003.

Although the Provincial Judges have continued to receive indexing of their salaries as provided in the Framework Agreement, they have not received increases similar to those of the federally appointed judiciary. In the result, in 2002, while the salary of a Puisne Provincial Judge was $179,167, the salary of a Puisne Superior Court Judge was $210,200. The following chart shows the relationship of the salaries of each bench for the past 4 years following the Drouin Commission Report.

	Superior Court Justice	Provincial Court Justice
April 1, 1999	$ 178,100	$ 161,440
April 1, 2000	$ 198,000	$ 172,210
April 1, 2001	$ 204,600	$ 175,999
April 1, 2002	$ 210,200	$ 179,167

At the time of the submissions presented before this Commission, it was expected that, on April 1, 2003, the salary of a Superior Court Justice could be expected to rise to approximately $216,000.00 as a result of the $2,000.00 increase and the indexing as recommended by the Drouin Commission,

We have set out the respective salaries of the two benches in some detail as they figured prominently in the submissions before this Commission.

The Submissions Made to the Commission

We note at the outset that the Commission did not conduct an inquiry respecting the appropriate design and level of pension benefits as set out in section 13 of the Framework Agreement. Issues relating to the design and level of pension benefits of the Provincial Judges

are currently being litigated in the courts. In the circumstances, neither the Government nor the Provincial Judges made submissions with respect to pension matters.

Over the course of 11 hearing days, the Commission received written and oral submissions on behalf of the Government and the Provincial Judges. In addition, the Commission received written submissions on behalf of the Criminal Lawyers' Association ("CLA"), the Ontario Crown Attorneys Association ("OCCA"), the Advocates Society, the Ontario Bar Association (OBA), and the Honourable Gregory T. Evans.

The primary thrust of the oral and written submissions made on behalf of the Provincial Judges was to seek salary parity with federally appointed judges. This position was supported by the written submissions of the CLA, OCAA, OBA and the Honourable Gregory T. Evans. In the alternative, the Provincial Judges submitted that there ought not to be a significant disparity in the salaries of judges appointed by the federal Government and the salaries of Provincial Judges. This position was also articulated in the written submissions of the Advocates Society which urged the Commission to minimize the current disparity in salaries.

The primary thrust of the oral and written submissions of the Government was to propose the following, more modest increases:

April 1, 2001 -- 2.5 % inclusive of the average wage increase already implemented

April 1, 2002 -- 2.75 % inclusive of the average wage increase already implemented

April 1, 2003 --2% and elimination of the average wage increase

The submissions of the Government and the Provincial Judges illustrated different approaches, and not just different results, to the role of the Commission and the issues within our scope and jurisdiction.

The submissions of the Provincial Judges focused on the key findings of previous Commissions, and in particular those of the Beck Commission, thus adopting a more historical and "evolutionary" approach to the application of the Framework Agreement criteria. That approach caused the Provincial Judges to submit

> ... the logical consequences flowing from the Beck Commission's findings and principles require the establishment of salary parity in the present circumstances. In this regard, it is the position of the Conference, as outlined more fully below, that in light of all of the factors considered by the previous Commission and relevant to the determination of judicial salaries (including the duties and responsibilities of provincially-appointed judges, the salaries of both lawyers and the most senior civil servants, and the continuing strength of the Ontario economy), the case for parity is even more compelling now than it was before the Beck Commission... "

It was further submitted that "Any retreat from the Beck Commission's essential determination that there is no justification for the existence of any substantial disparity between the salaries of provincially- and federally -appointed salaries (sic, judges) would signal the return of the Ontario Court of Justice to the second-class status that was so firmly and forcefully rejected by the Beck Commission."

This more historical approach informed the submissions of the Provincial Judges with respect to many of the principles of judicial compensation considered by previous Commissions including (a) the nature and importance of the work of the Provincial Judges, and the focus on the evolution of the responsibilities and jurisdiction of the Ontario Court of Justice, (b) the independence of the judiciary and (c) the need to attract and maintain the best candidates.

In addition, the Provincial Judges addressed the economic conditions in the province, and compared the salaries paid to Provincial Judges to other comparables including senior civil servants, lawyers in private practice and, of course, the federally appointed judiciary.

The approach of the Government in their written in oral submissions was self-described as a more "analytical" approach which addressed primarily the interpretation of the language of the Framework Agreement. The Government submitted that the Framework Agreement is a statute which must be interpreted in the same way other statutes must be interpreted and applied. That is why, in part, comparison to the federally appointed judiciary was neither possible nor appropriate as both the criteria under which the remuneration of federally appointed judges was determined, and the priorities and responsibilities of the federal Government, differed from the provincial process for determining remuneration, and the provincial Government's priorities and responsibilities. Focus on the language of the section 25 criteria also led to comprehensive submissions with respect to the interpretation and application of the terms which can be found in section 25 including the "laws of Ontario" and "fair and reasonable compensation in light of prevailing economic conditions" and the appropriate interpretation of "any other factor."

The Government's submissions rejected the "evolutionary" approach and urged the Commission to rely and focus only on those changes which have occurred since the implementation of the Beck Commission's recommendations. In this regard it was the Government's view that the past evolution in the responsibilities and jurisdiction of the Ontario Court of Justice had been dealt with and accounted for by prior Commissions, and the

implementation of the recommendations of those prior Commissions, and should not therefore be considered again by this Commission.

The submissions on behalf of the Government also addressed the matter of judicial independence, and the financial security aspect of that independence. In its submissions, the Government agreed that financial security is one aspect of judicial independence but asserted that this principle was of little practical assistance to the inquiry of this Commission because there is no dispute that the current level of remuneration met the judicial standard set out in the PEI Reference that Judges' salaries not fall below the basic minimum level of remuneration which is required for the office of the judge, or salary that was "... adequate, commensurate with the status, dignity and responsibility of the office." (At paragraph 194)

Although the submissions made on behalf of the Government addressed such comparators as senior civil servants, lawyers in private practice and other judges, including the federally appointed judiciary, it was the primary position of the Government that the criteria of the Framework Agreement were not criteria which were comparator based. In any event, because of their unique position and skill, the Provincial Judges could not be appropriately compared to any other group.

We have in part addressed our view of the divergent approaches of the principal participants in our introduction wherein we conclude that both the specific language of the Framework Agreement, and the findings of the Supreme Court in the PEI Reference require that the criteria set out in the Framework Agreement be interpreted and applied in a manner which recognizes the broad public interest in this independent process. An analytical approach which is

cognizant of the public policy role embedded within the Framework Agreement and the Commission process is required. An analytical approach does not exclude the historical or evolutionary approach advocated by the Provincial Judges. Neither does it preclude consideration of such factors as the need to attract to the bench the ablest men and women (a factor specifically referred to by the Supreme Court) and avoid the perception of a two-tiered justice system in which the Provincial Judges are effectively accorded second-class status. Although these factors may be perceived as relating primarily to a policy making role in the administration of justice, rather than the remuneration of the judges, one must bear in mind that in making its recommendations this Commission has been directed to consider the purposes set out in the Framework Agreement. Purposes such as the desire to develop an efficient and effective justice system requires the consideration of the impact of salary recommendations upon the administration of justice.

Evolution of the Ontario Court of Justice and the Beck Commission

We do not consider it necessary to set out the historical context of the Framework Agreement, or the findings and recommendations of predecessor Commissions and the responses of various provincial Governments to their reports. The historical context is accurately and ably set out in the report of the Beck Commission.

With respect to the evolution of the responsibilities of the Ontario Court of Justice we do note our acceptance of the Beck Commissions findings that due to legislative changes and other initiatives relating to the administration of justice in the province, there has been a *de facto* transfer of criminal law jurisdiction to the Ontario Court of Justice. The

submissions and statistical data presented before this Commission confirmed the conclusions of the Beck Commission that in Ontario there is, in effect, a single Court of Ontario with the federally appointed judges of what is now called the Superior Court dealing primarily with matters of property and civil rights, and the Provincial Judges dealing primarily with criminal law. New and additional changes to the jurisdiction of the Provincial Judges since the Beck Commission made its recommendations continue the evolution of the responsibility of the Provincial Judges, and do not detract from the approach of the Beck Commission and its concern that differential treatment in the remuneration of federally and provincially appointed judges promotes the intolerable perception of a two-level system of justice.

The Framework Criteria

Overview

We turn next to our consideration of the criteria set out in the Framework Agreement, for it is in that context that we propose to address the submissions of the Provincial Judges that this is the appropriate time to recommend salary parity, and the submissions of the Government that one can't look to comparators for the Provincial Judges, or that, in any event, federally appointed judges are not an appropriate comparator.

We agree with the majority report of the Beck Commission that the primary criteria to consider when making recommendations concerning the salaries and benefits and allowances is "the need to provide fair and reasonable compensation for provincial judges in light of prevailing economic conditions in the province and the overall state of the provincial economy." Further, we agree that section 25 (f) of the Framework Agreement which refers to

"any other factor which [the Commission] considers relevant to the matter in issue" is not limited in any way by the other criteria set out in section 25. Section 25 (f) is an independent criterion.

That the list of criteria specifically enumerated in sections 25 (a), (b), (c), (d) and (e) is not exhaustive is confirmed by the preamble to the section itself. The preamble states that the Commission "is not limited to" the listed criteria, and directs the Commission to recognize the purposes of the agreement set out in paragraph 2. Those purposes include the stated intent that the decisions of the Commission "shall contribute to securing and maintaining the independence of the provincial judges" and, that the agreement is also "to promote cooperation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice." It is worth repeating that those stated purposes, which the Commission must recognize in making its recommendations, compel the Commission to consider more than the need to provide "fair and reasonable compensation," or "the prevailing economic conditions" and "the overall state of the provincial economy." Those purposes draw into the consideration of the enumerated factors the type of matters considered by the Beck Commission such as the need "to end outdated notions of hierarchy and second-class status" and the factors considered, in one way or another, by all predecessor Commissions, such as the need to attract the ablest candidates, the salaries paid to the federally appointed judiciary, the salaries paid to the most senior level of civil service in Ontario, and the earnings of practicing members of the Ontario bar.

Prevailing Economic Conditions

In examining the prevailing economic condition and the overall state of the provincial economy we make two observations. The first relates to the report of the Beck

Commission, and the increases recommended by that Commission. It is our view that those recommendations must be assessed in the context which existed namely that, notwithstanding the *de facto* transfer of criminal law jurisdiction, Provincial Judges had not received significant increases in seven (7) years. As stated by the Beck Commission at page 49, "If the increases are thought to be generous, they are only so in light of the extremely restricted salary position since 1991, which has seen an increase of just over $6,500 in the past seven years, as against $28,000 for the General Division in the same period. We would put particular stress on this point."

Secondly, the economic conditions which existed at the time of the Beck Commission differ from those at present. The Beck Commission found "it is perhaps not too strong a statement to say that the Ontario economy, in terms of growth, job creation and deficit reduction, has never been stronger." Before the Beck Commission all indicators were "reflective of the strong North American economy of which Ontario is Canada's major beneficiary" and caused that Commission to conclude "in short, in terms of the near future, the economic outlook for Ontario remains very strong." The Beck Commission stated at page 38

> On all of the evidence, it is unquestionably clear that the Ontario economy is in excellent shape and is continuing to grow and create jobs at record rates. As noted, the Government has been able to reduce personal income taxes while at the same time funding a variety of programs deemed important to Ontario's economic, social and cultural well-being. And all of this at the same time that the provincial deficit has been greatly reduced. Whatever the merits of an increase in remuneration for the judges may be, we are of the opinion that there is no case for restraint based on the condition of the provincial economy, or expenditure restraint by the Government itself."

An examination of the economic indicators presented before this Commission means that we are unable to come to the same conclusions about strong and robust economic conditions or the overall state of the provincial economy. At best we can characterize the economic indicators as uncertain and changing. Even during the time frame during which the

Commission conducted its hearings and deliberations, there were considerable changes. Thus, although the March 27, 2003, Budget Speech and Budget Papers projected increased revenues and a balanced budget with a reserve available for debt reduction, recent newspaper reports indicate otherwise, and refer to an increased deficit.

We have concluded that the information available to the Commission point to prevailing economic conditions which are less favourable than those at the time of the Beck Commission, and an overall state of the provincial economy which is less buoyant than was the case before the Beck Commission. The economic indicators do not go so far however as to point to the need for the extraordinary type of restraint which was required at the time of the Third Triennial Commission, or the type of restraint implicit in the Government's recommendations before the Commission that only minor salary adjustments should be recommended.

The prevailing economic conditions and the overall state of a provincial economy do no more than call for a degree of caution, and serve as a prudent reminder against being overly generous in determining what is "fair and reasonable compensation" when payment must come from the public purse. Recommendations with respect to what is fair and reasonable "in light of" prevailing economic conditions requires us to balance that which is otherwise fair and reasonable, with the prevailing economic conditions and the state of the provincial economy. Changing or uncertain economic conditions may require some restraint in effecting that balance, but here do not signify fiscal constraint of such magnitude as to ignore what would otherwise be "fair and reasonable compensation."

"Appropriate Salaries" and "Fair and Reasonable Compensation" - The Comparators

We turn therefore to the term "fair and reasonable." Both the term "appropriate" found in section 13, and "fair and reasonable" found in section 25 are relational terms. These terms naturally lead one to ask "appropriate" in what manner and for what purpose; "fair and reasonable" in relation to whom or what? Notwithstanding submissions to the contrary, we find that the language of the Framework Agreement itself invites concepts of comparability.

There are several comparables which could be made to which this Commission was referred. Counsel for the Government and counsel for the Provincial Judges compared the salaries of the Provincial Judges to Deputy Ministers, practicing members of the Ontario bar, including Crown Attorneys, the federally appointed judiciary and the provincially appointed judiciary in other provinces.

Deputy Ministers

We do not view the remuneration received by Deputy Ministers as a relevant comparator. Simply put, the duties and responsibilities of these civil servants, the skills required, and the compensation schemes under which they operate are so different from those of the Provincial Judges as to make comparison impractical. Moreover, and as expressed by the First and Second Triennial Commissions, there are significant and legitimate concerns about judicial independence when one relies upon salaries which are unilaterally set by the Government.

Although the actual salaries received by Deputy Ministers are not, standing alone, a relevant factor or appropriate comparator, how the Government has treated and continues to treat its most senior civil servants may be relevant. For example, where the Government is able

to provide significant or extraordinary increases to Deputy Ministers, it would be appropriate to conclude that similar types of increases are warranted to establish "fair and reasonable compensation in light of prevailing economic conditions." Conversely, if there is a significant disparity between lower salaries paid to Provincial Judges and higher salaries paid to Deputy Ministers, one can more readily conclude that the salary established by the Government for its most senior civil servants provides at least a minimum benchmark or guidepost to determine an appropriate salary for Provincial Judges. This is not to suggest that the salaries of Provincial Judges and Deputy Ministers should be in lockstep, but merely to indicate that circumstances similar to those present before the Beck Commission, where Deputy Ministers had recently received extraordinary increases leading to a disproportionate disparity, are not present here. In the circumstances presented before this Commission therefore we have placed little reliance on salaries paid to Deputy Ministers as a comparator, or as an aid in determining "fair and reasonable" compensation for Provincial Judges.

Lawyers in Private Practice and the Need to Attract the Ablest Candidates

Next, we turn to the matter of the remuneration of practicing members of the Ontario bar. An inordinate amount of the submissions made to the Commission revolved around this factor. The data tendered was subject to much controversy and debate, both in terms of general relevance, and, if relevant what data the Commission should consider. In this regard there was little agreement between the Provincial Judges and the Government about such matters as to what section of the bar was relevant; whether upper or lower salary restrictions should be considered in assessing the data submitted, and if they were, the degree of those restrictions; what age profile of practicing lawyers was relevant; what value should be attributed to the pension plan of the Provincial Judges in relation to the salaries of practicing lawyers; etc.

Depending on how one determines the criteria to be applied to the data presented, the figures relating to the remuneration of practicing members of the Ontario bar varied widely. For example, the consideration of a different age and salary restrictions alone created a 2000 partners' salary range of approximately $187,000.00 to approximately $267,000.00 at the 75th percentile. The income tax data presented also does not identify areas of practice, further detracting from the weight which we can assign to this information. In the result we do not view the data relating to the incomes of lawyers in private practice as significant if its use is restricted to trying to directly compare the remuneration of judges to the remuneration of practicing members of the bar.

The data presented is of greater importance and assistance however when it is viewed on a macro level and placed in context of the determination of what we consider to be another factor relevant to our inquiry, namely, the need to attract outstanding and able candidates to the bench. The need to attract candidates of the highest quality has been a pervasive theme in many of the reports of various Triennial Commissions and is a factor which we also deem as highly relevant. The salaries of practicing lawyers, whether they are in private practice, Crown counsel, or in-house counsel, is significant primarily to ensure that our salary recommendations act to encourage, and not discourage, the ablest applicants from accepting appointments to the bench. A significant disparity between the incomes of members of the bench and members of the bar will serve as a disincentive to those private practitioners whose experience and ability make them suitable candidates for appointment to the bench. The inevitable effect of such a disincentive in turn will hinder efforts "to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice" and would thus be inconsistent with that stated purpose of the Framework Agreement.

It was the Government's submission that the current level of remuneration has been adequate to attract outstanding candidates. There have not been recruitment or retention issues, and the quality of the provincial bench, and the high esteem in which it is held by lawyers and the public, has not been negatively impacted by any disparity between the salaries of the Provincial Judges and practicing lawyers. It was also noted that financial success as a practicing lawyer had little relevance to appointment to the bench, as there was no correlation between the skill set of a well paid lawyer and the skills required of a judge. Highly paid lawyers do not necessarily make better judges. The Government submitted also that as a number of appointments to the Bench have come from the ranks of Crown Counsel, the salaries paid to this group of lawyers were of equal relevance to any comparison to lawyers in private practice. In this regard we note that in 2003, the maximum salary of a number of Crown Counsel 4 (the most senior Crown Attorney and Civil Law Officers employed by the Government) inclusive of a pay for performance lump sum bonus, may be in excess of $ 182,000.00 (depending on the lump sum bonus) plus indexing calculated in a manner similar to that provided under the Framework Agreement.

We do not have any reason to doubt or question the Government's assertion that the current level of remuneration has been adequate to attract outstanding candidates. Neither do we dispute the premise that highly paid lawyers do not necessarily make better judges, or the relevance of adding Crown counsel salaries into the mix when examining the incomes of lawyers. Our concern with totally ignoring, or largely discounting, the remuneration of practicing lawyers is that growth in the existing disparity between the levels of remuneration will, over time, adversely affect the current enviable record of the Government in attracting quality candidates. To that end the income tax data submitted by both participants before this

Commission was relevant as providing a very general sense of lawyer's remuneration, and a somewhat impressionistic context of the relationship between the salaries of members of the bar and the bench.

Our salary recommendations are intended to take into account that appointments to the bench come from a cross-section of lawyers practicing in different areas of law, throughout the province. The recommendations also recognize that, in Ontario, both federal and provincial appointments to the bench are likely to come from the same pool of senior, able and experienced counsel and, in this sense, the Ontario Court of Justice must "compete" with the Superior Court of Justice in attracting the ablest candidates. Having regard to those two matters, we view the salary recommendations made herein as establishing an appropriate salary which will encourage, and not deter, applicants from seeking appointments to the provincial bench. We emphasize our use of the word appropriate, found in section 13 of the Framework Agreement. The issue is not merely to recommend a salary adequate to attract quality candidates, but to recommend salary levels which are appropriate and therefore commensurate with the status and responsibility of the office for which those candidates are sought.

Salaries Paid to other Judges

This leads us naturally to look at what we consider to be one of the most relevant factors in our inquiry respecting the appropriate base levels of salaries, namely the salaries paid to other judges. The submissions made on behalf of the Provincial Judges sought parity with the federally appointed judiciary of the Superior Court. In contrast, the submissions made on behalf of the Government, rejected such parity on the basis that linkage to the salaries of federally appointed judges would be an improper delegation of constitutional responsibility, and would be

an abdication of the province's exclusive constitutional responsibility. Moreover, it would ignore the different powers and responsibilities of the two levels of Government, particularly in the area of taxation. In addition the Government asserted that the jurisdiction of the two levels of courts was different, and that if the salaries of federally appointed judges were to be considered, the salaries of other provincially appointed judges across Canada should at least be given equal weight. In this regard it is to be noted that the Provincial Judges in Ontario are the highest-paid provincially appointed judges in Canada.

We turn first to the submissions for parity. We do not recommend parity and neither do we recommend any formulaic linkage to the salaries of the federally appointed judiciary. We agree that each level of judicial remuneration should be determined on its own merits, having regard to the criteria pursuant to which an independent Commission makes its recommendations. One can't ignore that the two groups of judges are paid by different levels of government, whose fiscal abilities and priorities are different, and who are accountable in different manners to the taxpayers from whom the necessary revenues are received. Even a simple reference to the methods by which the two levels of government provide for the annual indexing or adjustment to judicial salaries demonstrates this point. Although the relevant provincial and federal legislation each provide for annual indexing, the methodology by which that indexing is calculated yields different results (albeit the differences may be minor) thus impacting on the notion of parity.

The judges of the two courts also differ in other respects. Judges of the Ontario Superior Court are appointed under section 96 of the Constitution to courts of inherent jurisdiction and as such exercise different jurisdiction. The Provincial Judges are appointed under a statutory, not constitutional regime, namely section 41 (1) of the Courts of Justice

Amendment Act, 1989, although there can be no doubt that the Provincial Judges perform significant constitutional functions as outlined in Mackin v New Brunswick (Minister of Finance) [2002] 1 S. C. R. 405 at paragraph 52

> ... the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the *Constitution* under section 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under section 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by section 35 (1) of the *Constitution Act, 1982*.

Neither can there be any doubt that the principal of judicial independence (security of tenure, financial security and administrative independence) applies equally to the Provincial Judges notwithstanding differences in the origins and extent of jurisdiction.

We have read the minority report of our colleague and accept the differences in jurisdiction and responsibilities which distinguish Provincial and Superior Courts to which he refers. As he suggests, those differences may also lead one to conclude that parity is inappropriate. However, if the differences in the two levels of the courts do not, ipso facto, lead to the conclusion that the judges of each court should be remunerated in the same manner, neither do these differences automatically lead to the conclusion that the remuneration must be different. The real issue to be dealt with is whether, and if so how, the differences in jurisdiction ought to be addressed in the context of the mandate of this Commission to recommend "appropriate" salaries having regard to the criteria set out in section 25. And it is here that the findings of previous Commissions regarding the need to attract the ablest men and women, and the desire to avoid the creation of, or perception of, a two-tiered court system is a critical factor.

With respect to this last matter, we find, as did the very first Triennial Commission, that, on the whole, the work of the Provincial Judges although of a different type, is of equivalent responsibility and importance to that assigned to the judges of the Superior Court. The data presented before this Commission confirms that in Ontario, both federally and provincially appointed judges are members of the same integrated court system. The reality is that the Provincial Judges subject to this Commission process have effectively become the court dealing with criminal matters, while the Superior Court Judges deal primarily with civil and family matters. Although the Superior Court continues to have its inherent jurisdiction, and has exclusive jurisdiction over a relatively small number of criminal matters such as murder, the practical difference between the two courts is that one deals primarily with criminal matters while the other deals primarily with property and civil matters, including family law. The current Ontario court model is less hierarchical than in the past. There continues to be some supervisory or hierarchical role reserved to the Superior Court, but for the most part, the division of responsibility between the courts is determined more by subject area, and less by the seriousness or complexity of the matter.

Considering both what is fair and reasonable and the stated purpose of the framework "to develop a justice system which is efficient and effective while ensuring the dispensation of independent and impartial justice", the question that must be asked and answered is whether, or if, significant disparity in remuneration is appropriate given the jurisdiction and responsibility of the two courts. In this we agree with the Beck Commission that a substantial salary disparity is not appropriate, and we adopt the Beck Commission's reference to the writings of Professor Peter Russell, the leading scholar of the Canadian Courts, regarding an intolerable perception of a two-level system of justice. The Beck Commission stated at p. 43

In considering the salaries of the federal judges as extremely relevant, we are mindful of the writings of Professor Peter Russell, the leading scholar of the Canadian courts. Russell has noted that the differential treatment of federal and provincial judges promotes the perception of a two-level system of justice. To paraphrase Russell, this may have been tolerable when the provincial courts dealt with minor matters. It is not tolerable, however, when those courts are vested with jurisdiction over the most vital matters between the citizen and the state -- the criminal law.

Russell has been particularly acute in stressing what is the essentially a class-based distinction in treating the courts as a hierarchy, with the provincial courts at the lower end:

The traditional practices paying judges of the so-called lower courts much less than the judges of the intermediate and superior courts of the provinces may appear logical when the judicial system is viewed as a hierarchy. But the problem with translating this hierarchy of courts into a hierarchy of salaries is that we do not want the quality of justice to be hierarchically arranged. The quality of adjudication is likely to bear some relationship to the remuneration of the adjudicator. Commentators on our judicial system never tire of observing that most Canadians who experience the quality of justice at first hand do so in the lower courts. Accepting lower standards here in the courts used most often by Canadians from lower income brackets, is a significant source of social injustice in Canada.

While we do not recommend parity, we think the time is long past due to end outdated notions of hierarchy and second-class status.

Judges who deal primarily with the liberty of the subject, and the court with which most citizens are most likely to come into contact, must be remunerated in a manner which signifies "both to the sitting judges and to potential candidates, that the Ontario Government respects and trusts the professionalism and dedication of its judiciary. To be attractive the salary need not be -- and ought not be -- excessive. It must, however, be sufficiently generous to offset the financial and social restrictions Provincial Court judges must endure as a cost of ensuring their independence." (Report of the First Triennial Commission at p. 71).

We commenced the introduction of this report noting that the Commission has a role and responsibility to consider the public interest, broadly defined. A substantial disparity

between the salaries of the Provincial Judges and the judges of the Ontario Superior Court does not serve that broadly defined public interest. Not only does such disparity add to a perceived second-class status of the court which is most likely to be most directly involved with a larger section of the public, it is also inconsistent with the need to recruit and retain the ablest candidates, the factor to which we have already referred and to which we now return.

It is self-evident that the most qualified candidates who may aspire to judicial appointments are more likely to be attracted to the appointment which is better compensated, or which is perceived to have greater status or stature because of higher compensation. It is perhaps unfortunate that compensation and status are too often related in our society. However, when it comes to our system of justice, that relationship between compensation and status may have an adverse impact not only by causing the public to view the lower paid Provincial Judges as "inferior," but also by acting as a disincentive to the application of otherwise qualified candidates. The potential pool from which both the federal and provincial government appoints the judiciary is limited. On the basis of the material presented we accept that to fill vacancies in the Ontario court system both levels of Government recruit and select from the same pool. A significant disparity in salary is likely to negatively affect that "competition" for the most suitable candidates.

Before leaving this area of comparing the remuneration of the Provincial Judges to other members of the judiciary, we wish to address specifically the submissions that the salaries paid to other provincially appointed judges throughout Canada should at least be given equal weight. Although we have examined those salaries, we have not attributed as much weight to them as the salaries paid to the federally appointed judges of the Ontario Superior Court.

Given the almost horizontal, integrated composition of the court system in Ontario, where responsibility and jurisdiction is determined largely by subject area, we have given greater weight to the salaries paid to the judges of the Ontario Superior Court. In addition, although we were provided with voluminous materials and data regarding the jurisdiction of the two benches in Ontario, we were not provided with sufficient information to determine how these circumstances compared to the circumstances in other provinces. For example, substantive differences in jurisdiction and differences in the number of judges per capita would impact upon the appropriateness of looking to other provincial judges as a comparator.

Although we have attributed less weight to the absolute salaries paid to the provincially appointed judges in other provinces, we have examined with care the reports of independent remuneration commissions in other provinces. Although these various commissions may have been working pursuant to different listed criteria, their reports refer to many of the same factors which we have found significant. The need to attract the ablest candidates is a common theme. Similarly, reference is often made to the evolving nature of the jurisdiction of the provincial bench, and the increased duties and responsibilities which have accompanied changes in jurisdiction. Recent judicial remuneration commissions across Canada have recommended meaningful increases to the salaries of provincial judges. Thus, for example, the 2000 Alberta Judicial Remuneration Commission received and recommended a joint submission of the Alberta Government and the Judiciary which saw the salaries of the Alberta provincially appointed judiciary increase 13.5% over the 3 year period from 2000-2003, following a 33% increase over the preceding 2 years. The 1998 Judicial Compensation Commission in British Columbia recommended increases in excess of 20% for 1998-2000 raising the existing $ 118,400 salary, and recommending that it be incrementally increased to $144,000. These

recommendations were implemented. The 2001 Newfoundland Provincial Court Judges Salaries and Benefits Tribunal, whose recommendations were not modified by the Government, recommended salary increases of 15.2% for the 1996-1999 period, and a further 11.3% for the years 2000 to 2004.

For all of these reasons, the recommendation of this Commission with respect to salaries is as follows:

> Commencing April 1, 2001 the annual salary shall be $ 185,000.00 inclusive of the IAI calculated in accordance with section 45 of the Framework Agreement
>
> Commencing April 1, 2002 the annual salary shall be $ 198,000.00 inclusive of the IAI calculated in accordance with section 45 of the Framework Agreement
>
> Commencing April 1, 2003, the base salary shall be $202,500.00 exclusive of the IAI which shall be calculated in accordance with section 45 of the Framework Agreement and added to that base salary.

These increases represent increases over the $170,000.00 base salary for 2000 recommended by the Beck Commission of approximately 8.8% and 7% (inclusive of the IAI) in the first two years of our mandate, and a further 2.2% increase plus IAI commencing April 1, 2003.

The increases are in keeping with the manner in which the government has dealt with some, certainly not all, others paid from the public purse. In this regard, the Commission must be wary of the "cherry picking" which often accompanies reference to comparators. In this instance for example, the Government referred to recent health care settlements which indicate increases ranging from 8.5% (CUPE and SEIU settlements with the Participating Hospitals) to 9.2%-11.2% (ONA settlement with the Participating Hospitals) covering the 3 year, 2001-2004

period. Reference was also made to Police and Firefighter settlements which averaged between 3%-4% per year for the same period. Finally, reliance was placed on the 2001 settlement between the Association of Law Officers of the Crown (ALOC) and OCAA in which, following a binding arbitration award in which these lawyers received 30% over two years (1999-2000), the parties voluntarily settled for increases of 2% in 2002, and the Average Ontario Wage Increase in 2003 and 2004.

Counsel for the Provincial Judges however noted that the ALOC/OCAA voluntary settlement with the Government also contained the elimination of population controls for significant classifications effectively raising the maximum for Crown Counsel 2 by more than 10%, improved the merit system from 2%-3% to 4.5%, and contained pay for performance increase making certain lawyers eligible for increases of 9%. Similar observations were made about the performance pay bonuses agreed to by the Government in the AMAPCEO settlement applicable to managerial and professional staff which will see some provincial employees, at the maximum of their pay scale, receive additional increases and bonuses which will increase their annual remuneration by 11% to 18% over three years. The Provincial Judges also relied on the May 2003 settlement between the Government and the Ontario Provincial Police (OPP) which granted increases of 11.1% over a 3 year period from January 1, 2003 to December 31, 2005 over and above increases of 3%, 6% and 9% for senior staff with 8, 17 and 27 years experience.

The increases we have awarded fall between the two extreme ends of this broad spectrum. They are not as generous as those awarded to senior police officers and civilian staff employed by the OPP who will see increases in excess of 20% over the next 3 years. Neither do they equal the 8.5% increase over 3 years provided to some health care sector employees. The

increases are however in keeping with the types of increases recommended over the past several years by colleague independent commissions dealing with the remuneration of judges in Canada - particularly those who have expressed concern about the impact of a substantial disparity in compensation between the provincially appointed judiciary and practicing lawyers and the need to attract the ablest candidates to the bench.

In our view the salary recommended is appropriate and commensurate with the duties and responsibilities of the Provincial Judges, and with the respect and trust which a professional, independent judiciary is properly afforded.

Salary Differentials for Regional Senior Justices, the Associate Chief Justice and the Chief Justice

With respect to the greater salaries of the Regional Senior Justices, the Associate Chief Justice and the Chief Justice, paid in recognition of the increased administrative duties and responsibilities associated with these offices, we recommend that the current differential between these Justices and the Puisne Judges be preserved to the extent possible, except that in no case shall the salary of the Regional Senior Justice exceed the salary of a Puisne Judge of the Ontario Superior Court.

Where maintenance of the current differential results in circumstances where the salary of a Regional Senior Justice is at the same level as the salary of a Puisne Judge of the Ontario Superior Court, the Associate Chief Justice and Chief Justice shall nevertheless be paid an additional annual administrative salary differential of $7,500.00 (for the office of the

Associate Chief Justice) and $12,500.00 (for the office of the Chief Justice) more than that paid to a Regional Senior Justice.

The Industrial Aggregate Indexing Provision

Section 45 of the Framework Agreement provides a mechanism through which the annual base salaries of the Provincial Judges may be adjusted having regard to the Industrial Aggregate (hereafter the "IAI")

The government proposed that the IAI not operate during the term of the mandate of this Commission. It was argued that we had the jurisdiction to make such recommendation and that such recommendation did not require the Commission to amend the Courts of Justice Act. It was further submitted that elimination of the IAI would not constitute a reduction in the salaries of the Provincial Judges as the Provincial Judges currently received salaries in excess of the $170, 000.00, the base level of salary set by the Beck Commission for 2001. It was that base salary which could not be reduced by reason of section 25 (e) of the Framework Agreement. The Government's proposal to provide specific percentage increases and eliminate the IAI during the term of our mandate would not have the effect of reducing the salaries below that level.

The Provincial Judges submitted that we were without jurisdiction to change or amend the Framework Agreement in a manner which would effectively eliminate the IAI. Not only were we without jurisdiction to amend a statute such as the Courts of Justice Act to which the Framework Agreement was a schedule, but section 25 (e) specifically prohibited the Government from reducing the salaries of the judges. Elimination of the IAI would effectively permit the Government to reduce the salaries.

Section 13 (a) of the Framework Agreement requires this Commission to conduct an inquiry into the "appropriate base level of salaries." Section 27 indicates that the Commission's recommendations with respect to that matter are binding. The term "base level of salaries" is not defined and, in our view, is sufficiently broad to include consideration of the impact of the IAI. For that reason our recommendations with respect to the first two years of our mandate are inclusive of the IAI.

With respect to the third and final year however, we have recommended a base salary exclusive of all the IAI with the expectation that the IAI, calculated in accordance with section 45, will adjust that base salary.

There was a significant delay in appointing the members of this Commission. If that set of circumstances were to reoccur when the next Triennial Commission is constituted, and this Commission accepted the position that it ought to eliminate the IAI during the term of its mandate, it could, perhaps, result in allowing the Provincial Judges' real wages to fall because of inflation. In the PEI Reference, the Supreme Court noted that commissions inquiring into judicial remuneration should convene if a fixed period of time has elapsed precisely to guard against such *de facto* erosion of salaries. It noted also that government ought not to "freeze" judicial remuneration until they have received the report of the salary commission. The Supreme Court stated at paragraph 174

> Finally, and most importantly, the commission must also be *effective*. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of his nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that

> government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report.

The IAI adjustment has the effect of ensuring that the judges' salaries increase at an equivalent pace to average wages across Canada. In our view, we ought not to reduce or eliminate this benefit, particularly when it may take some time before the sixth Triennial Commission is constituted and makes its binding recommendations. If appropriate, the sixth Triennial Commission will be free to consider the impact of ongoing IAI increases on its recommendations.

Benefits and Allowances

Representation Costs as an Allowance

It was the Government's position that representation costs were neither a benefit nor an allowance. As such, the Commission did not have jurisdiction to make binding recommendations with respect to this matter. The Government asserted that the Framework Agreement did not expressly provide for the payment of representational costs, and that an express provision for such payment would be required where payment was to be made from the public purse. Moreover, funding for the representation costs was not constitutionally required.

With respect to the former position, it was noted that the Framework Agreement specifically addressed and provided for other types of costs including, for example, the remuneration of the members of the Commission, or professional services retained by the Commission. Within that context, the absence of any express reference to the payment of the representational costs of the Provincial Judges was telling, and indicative of an intent that such

costs were neither a benefit nor an allowance, and were not within the purview of the Framework Agreement.

With respect to the submission that such funding was not a constitutional requirement, it was submitted that the Supreme Court of Canada in the PEI Reference was silent on the issue of representation costs, and specifically left it to the executive or legislature to choose the procedures or arrangements pursuant to which they established an independent commission.

The Provincial Judges sought full indemnification of the costs incurred in their representation before this commission. It was their position that representation costs fell within the purview of "benefits and allowances" which were within the jurisdiction of this Commission. In this regard it was submitted that the Framework Agreement specifically contemplated the participation of the judiciary. Moreover, it was the constitutional mandate of this Commission to make recommendations with respect to representational costs "subject only to appeal to the courts." Reference was made to R. v Campbell (1998), 169 D.L.R. (4th) 231 at page 233 where the Supreme Court held:

> The composition and the procedure established for hearings before the independent, effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges. In some instances the resolution of the payment of representational costs will be achieved by agreement. Often the commission will have to determine the issue subject to an appeal to the court. In those circumstances the position adopted in the reasons of Roberts J. in *Newfoundland Association of Provincial Court Judges*, supra, may be appropriate, a matter upon which we need not comment in this motion. Suffice it to say, whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.

It was the position of the Provincial Judges that, before this Commission, the judiciary was required to be represented by counsel as it would be unseemly for the judges to represent themselves. The Commission process had an adversarial component to it which rendered direct participation by the judges, without counsel, inconsistent with the prohibition against negotiations with the other branches of government. It would, in effect, pit the judicial branch directly against the executive branch.

Finally, it was submitted on behalf the Provincial Judges that where the participation of the judges was both statutorily and constitutionally mandated, it was reasonable, fair and equitable to recommend that the representational costs be fully indemnified. In this the Provincial Judges referred to the Beck Commission where, after reference to the a decision of Roberts J., it was stated

> ... it is neither right nor just that the executive be represented by persons who services are paid out of the public purse, while those who represent the judicial branch are not. This is particularly so in a context where a hearing is statutorily required every third year, and a hearing process is constitutionally mandated as determined by the Supreme Court...

It is too strong statement to say that the government must constitutionally provide funding to the judges for their representation before this commission. We accept that none of the cases to which we were we were referred go so far. However, it must be recognized that in the PEI Reference, the Supreme Court encouraged participation by the judiciary stating at paragraph 173

> "... although section 11 (d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive and the legislature."

The Framework Agreement also envisions the participation of the judiciary. The Provincial Judges appoint one member of the Commission (section 6). The Commission is required to consider the oral and written submissions made by the Provincial Judges (section 20). The Framework Agreement acknowledges that by reason of that participation, the Provincial Judges may be represented. All of that is consistent with the purpose of the Framework Agreement to promote cooperation, and the efforts of both the executive branch of the government and the judiciary "to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice."

It is in this context that we have determined that the term "allowances" should be construed in a broad and liberal manner which recognizes the value and importance of the judiciary's participation in this Commission process. We agree that participation by the judiciary is a necessary precondition for this Commission to be objective and effective. The participation of the judges is in the public interest. In the PEI Reference the Supreme Court noted the difference between individual and institutional independence, and referred to the need for the institutional independence of the judiciary. Financial security forms part of that institutional independence. The collective participation by the Provincial Judges in this process promotes that institutional independence, and confirms that their participation is not solely a private or individual interest. Just as the participation by the government is in the public interest, so too is the participation of the Provincial Judges. For that reason both should be able to participate on an equal footing, each receiving the assistance of representatives who may be paid out of the public purse. An allowance paid to the Provincial Judges once every three years to cover representational costs associated with such participation falls within the ambit of section 13 (c) of the Framework Agreement. In addition, given the purposes of the Framework Agreement,

and the public interest in this Commission process, it can also be said that the collective participation by the Provincial Judges is consistent with the duties and responsibilities of being a judge, so that an allowance with respect to that participation is reasonable.

Having determined that reimbursement for representational costs are an allowance under section 13 (c) it remains to be decided what that allowance should be.

The premise and rationale for the payment of representational costs as an allowance is that as the participation of both the government and the judges in the commission process is in the public interest, it would be fair, equitable and reasonable for both to be paid out of the public purse. It follows therefore that the method of payment for both should be made on the same basis. We therefore recommended that the legal representational costs of the Provincial Judges be reimbursed as an allowance, and be calculated on the basis of the maximum hourly rate paid by the Government to its legal representatives. In addition, and in recognition of the fact that the government may have access to internal resources not available to the Provincial Judges, we recommend that the Government pay all of the disbursements incurred by the judges including any expert or consultant fees. We do not go so far as to suggest that the allowance be limited to the exact or an equal number of hours billed by government counsel. Such a correlation may not be feasible or appropriate given the nature of the issues raised and the work performed. However, although the number of hours spent may vary, the principle that the work be paid at equal rates is appropriate given that both are being paid out of the public purse.

We recognize that this recommendation will undoubtedly require some contribution by the Provincial Judges to their overall representational costs. However, given that

the private or individual interest of the judges will be favourably impacted by this Commission process, we do not consider the requirement for such contribution to be unreasonable. Although it is the public interest and not a private interest which is the primary reason for the Provincial Judges' participation before the Commission, acknowledging that the effect of this Commission process includes an individual interest suggests that some contribution to their overall representational costs is a reasonable expectation. For ease of administration we direct that the representational costs allowance be paid to the Executive of the Association, and through it to counsel. We would anticipate that counsel will be able to agree on costs having regard to our recommendation. However, if they are unable to agree, we will remain seized of the matter to hear their submissions.

Expense Allowance

We recommend that the current $2,000.00 allowance be increased by a modest amount to $ 2,500.00.

Mileage

We recommend that the current mileage reimbursement be increased to $0.37 per kilometer in Southern Ontario and to $0.40 per kilometer in Northern Ontario.

Benefits

We recommend the following changes to the Health Benefits Plan. We note that some of these changes were agreed to by the Government in their written submissions. The adjustments recommended represent modest increases to the benefit plans. In our view the current package of benefits is fair and reasonable, both standing alone, and when one compares it to those of others paid out of the public purse. Cost containment measures with respect to

benefits through the redesign of benefit plans, off sets of benefits and even benefit rollbacks are not unusual in both the private and public sectors as premium costs for providing benefits have risen with increased claims and new and more expensive medical drugs and procedures. There is nothing before us however to indicate that there has been an extraordinary rise in premium cost or claims with respect to the benefits provided to the judges and we do not see a need for significant changes to the existing plans.

Hearing Aid Benefit

We recommend increased coverage to $ 3,000.00 every five (5) years and maintenance of the current deductible and premium co-payment amounts.

Vision Benefit

We recommend acceptance of the Government's agreement to expand coverage to include reimbursement of laser eye surgery. In addition, we recommend maintenance of the current co-payment of premiums but recommend an increase in coverage to $450.00 every two (2) years.

Out of Province Medical Coverage

We recommend that an updated version of the benefits as detailed in the Governments reply brief be provided in the insurance policy and plan documents. We also recommend the addition of the Global Medical Assistance to this benefit program for active and retiree judges.

Paramedical Benefits

The government has agreed to add Acupuncturist and Masters of Social Work as covered practitioners. We do not recommend any other changes to this benefit.

Prescription Drug Benefit

We do not recommend any changes to the current plan.

PSA Test

The submissions indicate this service is already covered. If it is not, we recommend that it be covered.

Employee and Family Assistance Plan (EFAP)

We recommend acceptance of the Government's willingness to amend its Ministry of the Attorney General EAP program to include judges. As with all EAP programs, we assume that this is confidential. If there is any issue with respect to such confidentiality, we recommend that the EFAP program be provided through a different, external provider to ensure that the independence and privacy of the Provincial Judges is protected.

Accidental Death Benefits

The Government has agreed, and we recommend, increasing the existing accident benefits to $250,000.00 for full time judges and $175,000.00 for part time and per diem judges. We do not recommend any other changes to this benefit.

Life Insurance

We note that the government has agreed to remove the restriction that automatically designates the spouse or other person who qualifies for judges' survivor allowance as the designated beneficiary. We recommend acceptance of this agreement.

We recommend that the life insurance benefit for retired judges be increased to $ 6,000.00.

Long Term Income Protection Plan

We do not recommend any changes to this plan.

Appeal Procedure

We do not recommend any changes to the current procedures.

Vacation Carry Over

We recommend that the carry over provisions be amended to reflect the increased vacation recommended by the Beck Commission and that the judges be entitled to carry over their full vacation entitlement for a one year period.

Dated At Mississauga, this th day of December, 2003.

Louisa M. Davie - Chair

See attached Minority Report

Douglas K. Gray - Government Nominee

John C. Murray - Judges Nominee

MINORITY REPORT

I have reviewed the Report prepared by my colleagues on this Commission, and, with regret, I must differ with their conclusions in a number of significant respects. On the substantive issues before this Commission, my disagreement is with respect to the level of salaries payable to provincial judges, and with respect to the issue of representation costs. I disagree with the reasoning by which my colleagues have arrived at their conclusions in both respects.

Overview

While this is the fifth Triennial Commission, constituted to make recommendations regarding salaries, benefits and pensions of provincial judges in Ontario, it is, in fact, only the second such Commission that follows the seminal decision of the Supreme Court of Canada in *Re P.E.I. Reference*, [1997] 3 S.C.R. 3. I will discuss that decision in more detail later. Some years prior to the release of that judgment, the parties to this proceeding had entered into what is now known as the Framework Agreement. That agreement is incorporated in legislation: s. 51.13 of the *Courts of Justice Act*, and the Schedule to that Act.

In the *P.E.I. Reference* itself, the Supreme Court of Canada outlined a constitutional imperative as it relates to the fixing of salaries, benefits and pensions for all judges, including provincial judges. At a minimum, there can be no changes in salaries, benefits or pensions for judges unless they have first been reviewed by an independent Commission, which has the authority to make non-binding recommendations to the relevant government. The government, for its part, can reject those recommendations,

but must, if necessary, justify such a rejection in a court of law. The court's review, in such a case, is on a standard of simple rationality. All of this has been recently discussed by the Court of Appeal in *Ontario Judges' Association et al v. Her Majesty the Queen in Right of the Province of Ontario* (October 29, 2003).

This background has been reviewed by my colleagues, but it is noteworthy that, in Ontario, the promulgation and enactment of the Framework Agreement preceded, by about three years, the decision of the Supreme Court in the *PEI Reference*. It is also significant that the agreement itself exceeds the constitutional minimum: instead of non-binding recommendations, the agreement contemplates binding determinations by the Commission on salaries, benefits and allowances of provincial judges, and non-binding recommendations only on the appropriate design and level of pension benefits.

Thus, it is evident that, under the Framework Agreement, the government has given up its right to reject recommendations of a Commission such as this, at least on salaries, benefits and allowances. One of the significant checks and balances contemplated by the Supreme Court in the *P.E.I. Reference* is accordingly not in place here. For that reason, in my view, a Commission constituted under the Framework Agreement must be particularly cautious to ensure that its recommendations are seen to be in accordance with generally accepted standards, as discussed in the *P.E.I. Reference* itself. Also, while I agree with the majority that policy issues are not to be ignored in the deliberations of the Commission, such policy issues are only those captured by the Framework Agreement and the statute within which it is incorporated.

Apart from the process implications that flow from the *P.E.I. Reference*, it is instructive to note the discussion in the majority judgment in that case, written by Chief Justice Lamer, with respect to the considerations that arise in substantive terms relating to judges' salaries, benefits and pensions. Apart from the specific holding in that case that judicial salaries may not fall below a certain minimum level (an issue which has no relevance here), it should be noted that the Chief Justice also discussed, at pages 98-102, the appropriate treatment of judges' remuneration as compared to others who are paid from the public purse. He made the point that different treatment of judges, whether negatively or positively, can create issues respecting judicial independence. While salary cuts for judges that are not similarly imposed on others paid from the public purse can be problematic, so too can increases be problematic. At page 99, he observed that, "In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse." In discussing this point as it relates to salary increases and decreases, he noted at page 100, "Manipulation and interference most clearly arise from reductions in remuneration; those reductions provide an economic lever for governments to wield against the courts. But salary increases can be powerful economic levers as well. For this reason, salary increases also have the potential to undermine judicial independence, and engage the guarantees of s. 100." [Emphasis added].

One of the cases discussed by the Court in the *P.E.I. Reference* was its earlier decision in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56. In that case, it was contended that it Is constitutionally impermissible to require judges to contribute to the cost of providing

their pensions, unlike the situation of many, if not most, citizens who are fortunate enough to have pension plans made available to them.

The Court rejected that argument, and made the point that judges themselves are citizens, and their pensions and other forms of remuneration must be measured against the normal expectations of other citizens in like circumstances. It is noteworthy that Chief Justice Dickson, for the majority, quoted with approval the judgment of Mr. Justice Holmes (dissenting) in *Evans v. Gore*, 253 U.S. 245 (1920), at page 265:

> "I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends."

In discussing both the *Beauregard* and the *P.E.I. Reference* cases, MacPherson, J.A., for the Court of Appeal in the recent *Ontario Judges' Association* case referred to above, noted at paragraph 99 of the Court's Reasons for Judgment, that "A central theme of both cases is that, as a general proposition, a government which treats judges, in terms of compensation, as well as or better than other people paid from the public purse does not run afoul of the constitutional principle of judicial independence."

Quite apart from judicial authority, it seems to me to be salutary to bear in mind that the purpose of proceedings of this kind, and the fixing of salaries, benefits and allowances as a result, is to ensure judicial independence. Judicial independence will not be advanced, however, if judges are seen to be a privileged class, compensated greatly in excess of what the ordinary right-thinking citizen would think is reasonable. In my view, the contrary may be true and, as observed by Chief Justice Lamer in the *P.E.I.*

Reference, an overly-generous treatment of judges, compared to others paid out of the public purse, may itself create issues respecting judicial independence.

The touchstone, in my opinion, must be to measure compensation for judges against that given to others who are paid out of the public purse, no more and no less. As observed by MacPherson, J.A., above, where judges are compensated in a manner consistent with the manner in which others paid out of the public purse are compensated, judges have no cause for complaint on constitutional grounds, and in my opinion they will have been treated fairly by any reasonable standard.

Judicial Salaries

My colleagues have examined a number of factors in assessing the appropriate compensation package for provincial judges. For the most part, I do not dispute that the factors considered by the majority are appropriate factors to at least be considered. At the risk of over-simplification, the factors considered by the majority are: prevailing economic conditions; salaries paid to Deputy Ministers; incomes of lawyers in private practice; and salaries paid to other judges, both federally appointed and provincially appointed in other provinces. I should mention that while the majority alludes to the fact that the government relied on salaries paid to Crown lawyers as a relevant comparison, the majority makes only passing reference to this factor and does not appear to place any significant reliance on it.

Again at the risk of over-simplification, it is evident that the most significant factor relied on by the majority is a comparison with federally-appointed judges. In my view, such a comparison is inapt, particularly in the current economic circumstances.

At the outset of this discussion, I wish to make it clear that I do not intend, in any way, to denigrate the significance of the work done by Provincial Court judges, or to suggest that their work should be undervalued. On the other hand, I do not agree, as stated by the majority, that "the work of the Provincial Judges although of a different type, is of equivalent responsibility and importance to that assigned to the judges of the Superior Court.", nor that "for the most part, the division of responsibility between the courts is determined more by subject area, and less by the seriousness or complexity of the matter." In my respectful view, such an approach does not give adequate recognition to the historical underpinnings of our Superior Courts, and reflects a lack of appreciation of their constitutional significance in the fabric of this nation.

I begin by reproducing, for ease of reference, certain provisions taken from the *Constitution Act, 1867*:

> "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, -
>
> > 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
>
> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> 99. (1) Subject to a subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

> (2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to old office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.
>
> 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."

Certain of these provisions particularly are noteworthy. First, s. 96 deals not only with judges of Superior Courts, but also those of District and County Courts, of which more will be said later. Second, it is only judges of the Superior Courts that have the sort of security contemplated by s. 99: that is, that they are removable only by the Governor General on address of the Senate and House of Commons. Third, it is only the judges of the Superior, District and County Courts whose salaries, allowances and pensions are fixed and provided by Parliament.

Before discussing the specific constitutional and jurisdictional implications of these provisions, I would note only that the framers of the *Constitution Act* in 1867 obviously thought there was something particularly significant about Superior, District and County Courts that required special treatment in the Constitution itself. Provincial Courts were to be left in their entirety to the legislatures of the respective provinces, as opposed to Superior, District and County Courts which were to be accorded separate and different constitutional treatment. It is not in dispute that, prior to the advent of the requirement for independent Commissions, as mandated by the *P.E.I. Reference*, Superior, District and County Court judges were always paid more than Provincial Court judges. At the

very least, this signified some understanding on the part of responsible governments and elected representatives that the different constitutional position of these courts justified different treatment for compensation purposes.

Certain attributes of Superior Courts, which distinguish them from Provincial Courts in a material way, include the following:

(a) While Provincial Courts are statutory courts, whose jurisdiction is defined by statute, Superior Courts are courts of inherent jurisdiction, exercising jurisdiction analogous to that of the Royal Courts of Justice in England. As a court of inherent jurisdiction, the Superior Court has jurisdiction over any cause, unless it is specifically taken away: see *Board v. Board* (1919), 48 D.L.R. 13 (P.C.).

(b) Unlike a statutory court, the core jurisdiction of a Superior Court cannot be removed by Parliament or the legislatures: see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714.

(c) The Superior Courts have the sole jurisdiction to issue the prerogative writs of *certiorari*, prohibition and mandamus. Being part of the core jurisdiction of a Superior Court, this cannot be removed by Parliament or the legislatures: see: *Crevier v. Attorney General for Quebec et al* (1981), 127 D.L.R. (3rd) 1 (S.C.C.).

(d) The Superior Courts cannot be deprived of the right to review, on constitutional grounds, the validity if any law, whether federal or provincial: see *Attorney General of Canada et al v. Law Society of British Columbia et al* (1982), 137 D.L.R. (3rd) 1 (S.C.C.). In that case, Estey J. made the following observations at page 16:

> "There is, however, another and more fundamental aspect to this issue. The provincial Superior Courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(15) of the *Constitution Act, 1867* and are presided over by judges appointed and paid by the federal government (ss. 96 and 100 of the *Constitution Act, 1867*).

Mr. Justice Estey also quoted the following passage from Chief Justice Ritchie's judgment in *Valin v. Langlois* (1879), 3 S.C.R. 1 at pp. 19-20:

> "These courts [provincially organized Superior Courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation...They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures..."

(e) The Superior Court has exclusive jurisdiction to issue writs of *habeas corpus*, a remedy now constitutionally protected by s. 10 (c) of the *Canadian Charter of Rights and Freedoms* for anyone arrested or detained. This jurisdiction extends to *habeas corpus* in both federal and provincial matters: see *Re Ange*, [1970] 3 O.R. 153 (C.A.).

f) Security of tenure for all courts is constitutionally protected, but the degree of protection is less so for Provincial Courts. As was noted by Major J. in *Ell v. Alberta*, 2003 S.C.C. 35 at paragraph 31:

> "The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s. 99 of the *Constitution Act, 1867*. This level of tenure reflects the historical and modern position of Superior Courts as the core of Canada's judicial structure and as the central guardians of the rule of law. Less rigorous conditions apply in the context of Provincial Courts, which are creatures of statute, but which nonetheless perform significant constitutional tasks."

Even within the criminal law field, the Superior Courts occupy a position that is significantly different from the Provincial Courts. As observed by the majority, it is true that the vast majority of criminal cases heard are processed by Provincial Courts. However, it is noteworthy to observe that Superior Courts act as appellate courts from Provincial Courts in summary conviction matters, both under the *Criminal Code* and under the *Provincial Offences Act*. Furthermore, as observed earlier, the prerogative writs as they relate to criminal matters are dealt with by Superior Courts. This means that a Superior Court judge can grant *certiorari* to a decision of a Provincial Court judge. *Habeas corpus* in criminal matters is reserved to Superior Court judges. While it is a remedy that is not often used, its availability acts as a significant check and balance on what could otherwise be an untrammelled power to detain citizens unlawfully. It has been noted that the writ is "of immemorial antiquity", and that it is "perhaps the most important writ known to the constitutional law of England.": see *Black's Law Dictionary*, 7th Ed., page 715.

Before leaving the criminal law field, it must be mentioned that, while, as observed earlier, Provincial Courts process the overwhelming majority of criminal cases, there is nevertheless reserved to Superior Courts a core of cases, including murder, that must

be heard by them. Furthermore, it is only at a criminal trial in a Superior Court that the accused retains the right to be tried by a judge and jury. In addition to the right of *habeas corpus*, the right to trial by jury has been described in many quarters as one of the bullwarks of the protections afforded to the citizenry under the criminal law.

If, as the majority appears to assume, the Provincial Court has become the court that deals primarily with criminal matters, it nevertheless is the case that some important criminal jurisdiction remains in the Superior Court. Some of this jurisdiction is constitutionally entrenched, and some of it reflects policy decisions made by Parliament under the *Criminal Code*.

From the foregoing, it is evident that I disagree with the statement of the majority that the work of the provincial judges, although of a different type, is of equivalent responsibility and importance to that assigned to the judges of the Superior Court. In my view, the Superior Courts occupy a position, as referred to by Mr. Justice Estey in the *Law Society of British Columbia* case, "of prime importance in the constitutional pattern of this country," and, as referred to by Mr. Justice Major in the *Ell* case, they are "the core of Canada's judicial structure and ... the central guardians of the rule of law." As important as the work of the Provincial Courts may be, their position in the fabric of our judicial system cannot approach the position alluded to by Mr. Justice Estey or by Mr. Justice Major.

I will not leave this discussion before briefly dealing with the position of the County and District courts. They are also mentioned in sections 96 and 100 of the *Constitution Act, 1867* (although, perhaps significantly, not in s. 99, a section reserved for Superior

Courts), but they no longer exist in Ontario. While mentioned in the Constitution, unlike Superior Courts they were not courts of inherent jurisdiction. Their jurisdiction was statutory, which meant that if a statute did not confer jurisdiction over the particular subject matter on the court, the court did not possess it: see *Hayes v. Hayes*, [1939] O.R. 242 (C.A.), and *Reference Re Constitutional Validity of Section 11 of the Judicature Amendment Act, 1970 (No. 4)*, [1971] 2 O.R. 521 (C.A.).

In effect, the County and District Courts in Ontario possessed, by statute, a portion of the jurisdiction of the Superior Court (then called the High Court of Justice, a branch of the Supreme Court of Ontario). In jurisdictional terms, the distinction was primarily monetary, that is, the County and District Courts had jurisdiction to entertain an action for damages for up to a certain amount. There were other jurisdictional limits as well: see *Hayes v. Hayes*, *supra*.

Several years ago, the County and District Courts in Ontario were abolished, and their former jurisdiction was rolled into that of the Superior Court. Judges of the then County and District Courts were appointed as judges of the Superior Court, then called the Ontario Court (General Division). Of significance here is the undisputed fact that judges of the then County and District Courts were always paid less than judges of the Superior Court, by whatever name it was called. In this connection, it is also of significance to note that early commentators on the compensation to be given to Provincial Court judges, such as the late Chief Justice McRuer, had recommended that Provincial Court judges be paid in a manner comparable to County and District Court judges. It was never suggested that Provincial Court judges should be paid the same as those in the Superior Court, and I have little doubt that this was because of the "prime importance in

the constitutional pattern of this country" that was occupied by the Superior Court, an observation that could not be made about either the County and District Courts or the Provincial Courts.

It will be evident from the foregoing that I disagree with the majority in their reliance on the Report of the Beck Commission, and, in particular, the conclusion of the Beck Commission that a disparity of any significance between the salaries paid to provincial judges and those paid to Superior Court judges should not be in place. Indeed, while the Beck Commission did not recommend parity in absolute terms, it did so in practical terms, by narrowing the difference to $5,800. In our case, the majority, while once again not endorsing the concept of absolute parity, nevertheless recommends a very small difference which maintains parity in any practical sense.

The majority appear to accept, at least in part, that there are significant historical and constitutional distinctions between the Superior Court and the Provincial Court, but rest their conclusion that there should be no significant difference in salaries on the proposition that any such difference will discourage able candidates from making application for appointment to the Provincial Court bench. The assumption appears to be that there is a "competition" for able candidates, and the Provincial Court bench will lose out in that competition unless the salaries are more or less comparable.

In my view, this is a red herring and is simply not borne out by the facts. All counsel who appeared before us acknowledged that the appointments to the Provincial Court bench have been, and continue to be, of the highest quality. The government has no shortage of applications from many outstanding candidates, and this has been so no

matter what difference in salaries there has been at any point in time. While recognizing this, the majority assert that maintaining comparable salaries is necessary to ensure that this state of affairs will continue. In my opinion, this is nothing more than speculation. If, indeed, there is a competition for candidates, the Provincial Court bench has fared very well in that competition, and no evidence was presented to us that would suggest that this will change as a result of any difference in salaries.

Before concluding my remarks on salaries, I will discuss briefly the other factors mentioned by the majority.

I agree with the majority that salaries paid to Deputy Ministers are not relevant, and for the reasons discussed by the majority. An additional consideration, not specifically mentioned by the majority, is that the salaries of Deputy Ministers are based on an entirely different salary structure. For obvious reasons, all judges of the same Court (except for Chief Justices, etc.) are paid at the same rate, no matter what their seniority may be and no matter what their individual workload may be. That is not true for Deputy Ministers. There is a range of salaries paid to Deputy Ministers, based on a number of different factors. Furthermore, a portion of a Deputy Minister's salary is a "re-earnable" bonus, based on merit. Such a system would obviously be entirely inappropriate for judges. Thus, to attempt a comparison would be like comparing apples to oranges. For this reason, as well as those discussed by the majority, I agree that salaries of Deputy Ministers are an inappropriate comparison.

I also agree with the majority that incomes of lawyers in private practice are irrelevant. As the majority have noted, there was great controversy about the data with which we

were provided, as well as the relevance, if any, of the specific levels of income that lawyers in private practice were said to have. To mention only one difficulty, it was not possible to segregate the data according to the discipline in which lawyers practice. Thus, for example, it was not possible to identify what lawyers practicing criminal law generally earn, assuming that a significant portion of the candidates for the Provincial Court bench are drawn from criminal law practitioners.

It was, however, possible to identify precisely what lawyers employed by the provincial government earn. Not mentioned by the majority is the fact that an interest arbitration board, chaired by arbitrator William Kaplan, determined that the most senior Crown lawyers should be paid at a rate that is roughly equivalent to that of Provincial Court judges. For this reason, arbitrator Kaplan awarded the Crown lawyers increases of 30% over two years. It is instructive to note that (as briefly noted by the majority), subsequent to the Kaplan award, the Crown lawyers voluntarily agreed to increases of a much more normative nature. Notwithstanding Arbitrator Kaplan's view that Crown lawyers should be paid approximately the same as Provincial Court judges, the converse does not appear to be accepted by the majority here: that is, Provincial Court judges should be paid approximately what the Crown lawyers have voluntarily agreed to most recently.

This circumstance illustrates a point that I will expand upon later in terms of comparisons. Comparisons are not made in a vacuum – they are made based on the interest of the party seeking to rely on the particular comparison, and they must be discounted when the logic of the comparison is undermined.

In terms of comparisons with other judges, the majority discount the relevance of salaries paid to other Provincial Court judges in Canada. The majority acknowledge that Ontario's Provincial Court judges are paid the highest of any Provincial Court judges in Canada, but discount this reality on the basis that we were not provided with sufficient information to determine how the circumstances of judges in other provinces compare to the circumstances in Ontario. With respect, I am at a loss to understand how this is so. It was acknowledged by counsel for the Judges' Associations in argument that the provisions of the *Criminal Code* that confer jurisdiction on the Ontario Court of Justice confer similar jurisdiction on all of the Provincial Courts in Canada. Any argument based on the jurisdiction of the Provincial Court as compared to the Superior Court, and the relative importance of the two courts, must be common throughout Canada. That being the case, I do not see how we can simply ignore the salaries of judges paid in the rest of Canada as if they did not exist. At the very least, they reflect a fairly common understanding of the relative worth, at least in salary terms, of the different levels of courts throughout our nation. For that reason, the salaries paid to judges of Provincial Courts in other provinces are at least as relevant, if not more relevant, than the salaries paid to a different level of court entirely.

That brings me, then, to my final observations on the relevance of a comparison between Provincial Court judges and Superior Court judges. It also brings me to the general observation I made earlier about comparisons: that is, any comparison, in salary terms, is only as persuasive as the logic upon which the comparator itself is based.

The current salaries for Superior Court judges were fixed as a result of a Report by a Commission (the "Drouin Commission"), similar to this one, which fixed salaries for a four year period, commencing April 1, 2000, and expiring March 31, 2004. While that Commission considered a number of factors in arriving at its recommendations, it is evident that the most compelling factor considered by that Commission to be relevant was the salary paid to senior Deputy Ministers (colloquially known as "DM-3s") in the federal public service. I can do no better than to quote directly from the Report of the Drouin Commission at page 32:

> "We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries, and further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest."
>
> [emphasis added]

I have already made the point, as did the majority, that the salary paid to Deputy Ministers in Ontario is not a relevant comparator for Provincial Court judges. That is obviously not the case with respect to federally-appointed judges where, to once again quote the Drouin Commission, "rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest."

Apart from the fact that salaries for Superior Court judges are based on a comparator that is considered inapt in the context of salaries for Provincial Court judges, the logic of the approach adopted by the majority is, in my view, fundamentally flawed. If it is appropriate that there be no significant difference between the salaries paid to

Provincial Court judges and those paid to Superior Court judges, then logically the salaries of Provincial Court judges are being tied to those of Deputy Ministers in the federal public service. With respect, the rationale for any such comparison entirely escapes me.

As I observed earlier, the relevance of any comparator must be determined with a view to examining the factors upon which the value of the comparator itself is based. In this case, the value of the comparator is based on a factor that, in my opinion, is irrelevant to our task. The value of the comparator itself, then, is suspect.

That finally brings me, on the subject of salaries, to general economic conditions. It also brings me full circle to the discussion to which I alluded at the outset, namely, that any constitutional concern about the independence of the judiciary is satisfied if judges are paid in a manner that is consistent with others paid out of the public purse. I also made the point that judges themselves are citizens, and cannot claim any constitutional right to be treated more generously than citizens as a whole are treated.

I can perhaps make the same point in a slightly different way. If judges are treated significantly more generously than others who are paid out of the public purse, this can itself create problems of perception for the judiciary. Taken to an extreme, as discussed in the *P.E.I. Reference*, it can even create issues related to judicial independence. While I am not suggesting that the amounts recommended by the majority reach this level, I am concerned that the amounts recommended are at a level that can create unsettling distinctions between the treatment of provincial judges as compared to others paid out of the public purse.

It must not be forgotten that the salaries of Provincial Court judges have already been substantially increased as a result of the Beck Commission Report. As noted by the majority, the Beck Commission ordered that salaries be increased from $130,810 to $170,000, not including the AIW increases which brought those salaries, effective April 1, 2002, to $179,167. Apart from the AIW adjustments, the salaries awarded by the Beck Commission represented an increase of over 30%. I calculate the amounts awarded by the majority here, apart from an AIW adjustment in the third year, at 19.1%. An AIW adjustment in the third year will undoubtedly bring the increase to over 20% over the three year period.

While one can quarrel, perhaps, about the relevance of any particular salary increases paid to others out of the public purse, it is significant to note, as the majority does, that, for the most part, salary increases in the public sector in the last several years have been modest, in the range of between 2% and 3% per year. This is consistent with the rate of inflation, which has also been in the order of 2% to 3% per year.

Quite apart from the public sector, the citizenry as a whole has fared about the same. Salary increases generally have been in the order of 2% to 3% per year.

In my view, to now award increases of 20% over three years, hard on the heels of the Beck Commission increases of 30%, is simply unjustified. Furthermore, as I said earlier, I think that a comparison of the treatment of judges with others paid out of the public purse may create the perception that judges are a special class to be treated differently. Such a perception would be unfortunate.

This is particularly so, in my view, when one considers the most recent information available about the economic circumstances in this province. It is no secret that the provincial government is now facing a deficit of $5.6 billion, a figure which was confirmed by the report of the former provincial auditor, Erik Peters. As a result, the provincial government has made it clear that the expectations of those paid out of the public purse must be tempered. The amounts awarded by the majority will, in my view, create the impression that provincial judges are insulated from this reality, a result that, ironically, was disavowed by the Supreme Court in the *P.E.I. Reference*.

It will be evident that I disagree with much of the reasoning of the Beck Commission, and with the result reached by that Commission. However, it is not my intention to recommend any change in the result, even if we had the jurisdiction to do so. The integrity of the Commission process must mean that each successive Commission must accept the result of the preceding one, and build its recommendations upon those of preceding Commissions. By the same token, as I observed earlier, we cannot ignore the extraordinary increases awarded by the Beck Commission in determining what increases are appropriate for the term of our mandate. Because of the size of the Beck Commission increases, it is necessary, in my view, for us to be even more cautious in formulating our own recommendations.

For all of these reasons, it is my recommendation that increases of 3% or less in each year of this Commission's mandate be awarded, and that those increases be inclusive of any AIW adjustment.

Representation Costs

The majority justify their award of representation costs by construing the word "allowances" in the Framework Agreement as including the right to make such an award. With respect, I disagree.

In my opinion, this issue is not the same as one that may be confronted by a Commission that is charged with the responsibility of making non-binding recommendations, subject to acceptance or rejection by the government and which is itself subject to review by a court on a simple rationality standard. In our case, any "recommendation" of the Commission on representation costs is, in fact, a binding order for costs. Furthermore, as I discussed earlier, our jurisdiction flows from a negotiated agreement, which has been reduced to statutory terms. For that reason, we must find our authority to make a binding award of costs within the four corners of that agreement, and the statute which incorporates it.

It is not disputed that there is no inherent jurisdiction to award costs, and a statutory body only has such jurisdiction if it is expressly given to it by the terms of a statute: see *Liquor Control Board (Ont.) v. Karumanchiri* (1988), 25 O.A.C. 161 (Div. Ct.). In that case, a Board of Inquiry under the *Human Rights Code* had awarded costs to the complainants. The Divisional Court held that the Board had no jurisdiction to make such an award, and stated that "the power of the Board of Inquiry under s. 40(1) to 'make restitution including monetary compensation' is not an express provision for the award of costs to complainants under the Code." In my view, the same reasoning compels the conclusion that the jurisdiction of this Commission to make a binding

recommendation regarding "the appropriate level of and kind of benefits and allowances of provincial judges" does not confer jurisdiction to make an award of costs.

Since the majority have founded their conclusion regarding jurisdiction on the term "allowances" I will restrict my analysis to that term, although I should say that my conclusion would be the same if the majority rested their conclusion on the term "benefits". My reasons follow.

In my view, the term "allowances" must be interpreted in the sense in which it is used as part of the compensation package of judges. As part of that compensation package, judges have always had available to them certain allowances in addition to their salaries. (Indeed, judges currently have an expense allowance of $2,000, which is being increased to $2,500 pursuant to the recommendations of this Commission).

That this understanding is of some antiquity is confirmed when one examines s. 100 of the *Constitution Act, 1867*, which, as noted earlier, requires that the "Salaries, Allowances, and Pensions" of the judges of the Superior, District, and County courts be fixed by Parliament. This provision was drafted well over one hundred years ago, at a time when it could not possibly have included any notion of costs, and indeed long before any Commission process of this sort was even contemplated. The term "Allowances" in s. 100, particularly in the context in which it is found, can only be understood to refer to something that is part of the compensation package of a judge.

When one examines all of the provisions of the Framework Agreement, from which our jurisdiction flows, this understanding is made clear. The purpose of the agreement, as reflected in paragraph 2, is to establish a framework which is to include "a binding

process for the determination of judges' compensation." In my opinion, the specific matters upon which the Commission is to make recommendations, pursuant to paragraph 13, is restricted to matters of compensation as contemplated in paragraph 2.

In my view, this understanding is confirmed in the wording of paragraph 13 itself. For ease of reference, it reads:

> "13. The parties agree that in 1995, and in every third year after 1995, the Commission shall conduct an inquiry respecting:
>
> (a) the appropriate base level of salaries,
>
> (b) the appropriate design and level of pension benefits, and
>
> (c) the appropriate level and kind of benefits and allowances."
>
> [emphasis added]

Paragraph 25 of the agreement also makes it clear that what is in issue is the matter of judges' compensation. Once again, for ease of reference, paragraph 25 reads:

> "25. The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:
>
> (a) the laws of Ontario,
>
> (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the o overall state of the provincial economy,
>
> (c) the growth or decline in real per capita income,
>
> (d) the parameters set by any joint working committees established by the parties,

(e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence,

(f) any other factor which it considers relevant to the matters in issue.

[emphasis added]

One cannot overlook paragraph 43, which reads:

> "43. The parties agree that all provincial judges should be made aware of any changes to their compensation package as a result of recommendations of the Commission."
>
> [emphasis added].

It is evident, in my view, both from an historical analysis and from an analysis of the wording of the Framework Agreement itself, that the term "allowances" is restricted to a meaning consistent with judges' compensation, and cannot be distorted so as to include costs. Just as the words "make restitution including monetary compensation" could not be construed to include the power to award costs in the *Liquor Control Board* case, *supra*, so the term "allowances" cannot be similarly construed here.

In my view, policy considerations have nothing to do with this analysis. Whether the awarding of costs is beneficial, or not beneficial, is for the parties who negotiate the Framework Agreement to decide, and for the legislature which enacted it as part of the *Courts of Justice Act* to decide. It is worth noting once again, however, that the Framework Agreement was negotiated several years before the Supreme Court of Canada ruled, in the *P.E.I. Reference*, that judicial salary Commissions are required by the Constitution. Accordingly, when the parties drafted the Framework Agreement in

1994 they could not have had in mind any of the policy considerations that have been discussed in some of the cases dealing with the ability of a non-binding Commission to make recommendations regarding representation costs. For that reason, it is even clearer to me that the term "allowances" in the Framework Agreement can only be given a meaning consistent with the notion of compensation, rather than including any power to award costs.

For these reasons, I conclude that we lack jurisdiction to make a recommendation regarding representation costs, and I would not make such an order.

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Douglas K. Gray
Commissioner